Supreme Court, U.S.
FILED

No. 06- 06-936 JAN 3 - 2007

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IN THE

Supreme Court of the United States

BUYER'S CORNER REALTY, INC., SHERRY EDWARDS,

Petitioners,

v.

NORTHERN KENTUCKY ASSN. OF REALTORS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Sixth Circuit held, a large firm (the National Assn. of Realtors) selling a service to an entire market does not compete as a matter of law with smaller firms selling an equivalent service to the same market for the same price because (1) the smaller firms advocate the interests of specific racial or ethnic communities, or (2) the smaller firms have more restrictive sales policies than the large firm, or (3) because the smaller firms sell to a smaller group of buyers than the large firm.

2. Whether market definition disputes are factual questions, and if so, the quantum of evidence that will bar or require summary judgment.

3. Whether the rule of the National Assn. of Realtors barring realty agents from contacting the clients of other realty agents — a practice permitted by state law — violates the Sherman Act under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

4. Whether a real estate broker has suffered antitrust injury when (1) she has established all the elements of a Sherman Act tying violation, and (2) she is forced to buy a tied-in product she would not otherwise have purchased, and (3) she is forced by trade association rules not to compete in ways that are permitted by state law.

LIST OF PARTIES

Petitioners are Buyer's Corner Realty, Inc., and Sherry Edwards.

Respondents are Northern Kentucky Association of Realtors, Inc., and Northern Kentucky Multiple Listing Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Buyer's Corner Realty, Inc., discloses that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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Petitioners Buyer's Corner Realty, Inc. and Sherry Edwards respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

OPINION BELOW

The unreported one-page per curiam opinion of the Sixth Circuit appears at 2006 U.S. App. LEXIS 25157 and is reproduced below at 1a. The underlying published decision of the district court is reported at 410 F. Supp. 2d 574 (E.D. Ky. 2006) and reproduced below at 2a. The district court's judgment appears at 22a.

JURISDICTION

Judgment of the Sixth Circuit was entered on Oct. 4, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." This Court has held that only unreasonable restraints are outlawed, not *all* restraints. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

The Clayton Act, 15 U.S.C. §§ 15, 26, allows private suits by individuals injured by violations of the antitrust laws.

STATEMENT OF THE CASE

Facts

Sherry Edwards is a real estate broker in Northern Kentucky. She operates a real estate brokerage called Buyer's Corner Realty, Inc. For simplicity, both will be referred to in the singular as "Edwards."

In order to purchase a subscription to the multiple listing service ("MLS") operated by respondent Northern Kentucky Multiple Listing Service ("NKMLS"), she was required to buy trade association services from three Realtor associations: (1) the local Realtor association (respondent Northern Kentucky Assn. of Realtors ("NKAOR")), (2) the state Realtors association (Kentucky Assn. of Realtors), and (3) the National Association of Realtors ("NAR").

If the three Realtor association products had not been tied to MLS services, Edwards would not have bought any of them. Edwards voluntarily buys trade association services from the National Association of Exclusive Buyer Agents ("NAEBA"), which advocates the philosophy that realty agents should not hold conflicting interests in a real estate transaction. NAEBA members like Edwards only represent buyers. In order to avoid conflicts of interest, Edwards and NAEBA members never represent sellers. In the view of Edwards, her forced purchase of Realtor association services harms the public, because NAR permits its members to represent buyers and sellers in the same transaction.

Edwards has a second objection to being forced to purchase Realtor association services: she is forced to agree to NAR rules that prohibit her from contacting property

owners who have current listings with other realty agents. If it were not for the rule, Edwards would like the freedom to contact sellers — most of whom are also buyers — to advise them of her buyer-oriented services. Sellers listed with other agents have listing contracts giving the agent the exclusive right to represent them in their role as seller. Edwards has no desire to disrupt these contractual relations. Since she only represents buyers, she has no interest in representing sellers. But property owners almost never have exclusive contracts with any agent to represent them in their role as buyers. Edwards would violate no Kentucky law by inviting these sellers to engage her to represent them when buying another property. NAR rules prohibit such contacts. If she breaks the rule, she can be expelled from the MLS. Edwards objects to the requirement imposed by Realtor membership that she give up her right to vigorously compete with all other Realtors in the Northern Kentucky area. She asserts her ability to earn a living has been impaired by the non-solicitation rules of the Realtor associations. She seeks an injunction against enforcement of the rule, but no damages for lost income.

District Court Procedural History

Edwards filed suit for damages under the Sherman Act in the U.S. District Court for the Eastern District of Kentucky, claiming four years' membership fees as damages. She also sought injunctive relief. Jurisdiction was based on respondents' substantial impact on interstate commerce through four years of MLS activities: Sales of billions of dollars of real estate.

Edwards's theory was that defendants had committed a tie-in violation, either as a *per se* violation, or a rule of reason violation.

Edwards asserted a *per se* claim was established by proof of five elements: (1) that NKAOR had market power in the market for MLS services, that (2) there was a tie-in between MLS subscriptions and purchase of NAR trade association services,[1] (3) that NAR trade association services were a separate product than MLS subscriptions, (4) that the tie caused a not-insubstantial impairment in the market for the tied product — trade association services sold to real estate agents and appraisers, and (5) that NKAOR benefited from sales of the tied product.

Edwards asserted a rule of reason claim was established by proof of (1) an unreasonable restraint on competition in the market for trade association services, or (2) an unreasonable restraint on competition in real estate brokerage markets from NAR's no-contact rule. The parties filed cross-motions for summary judgment at the close of discovery. The district court granted the summary judgment of defendants.

Sixth Circuit Procedural History

The Sixth Circuit affirmed in a per curiam opinion adopting the district court opinion, below at 2a.

The Essential Issue in the Lower Court

The lower court dismissed the case after ruling on one essential issue: NAR does not compete with any of the one dozen other trade associations that sell trade association

1. Edwards asserted the per se violation occurred only as to NAR trade association services. Although three separate Realtor association products were forced (local, state, and national), she claimed a *per se* violation existed only as to NAR sales.

services to residential real estate agents and appraisers. The lower court quoted extensively from the district court *Reifert* opinion:

> While it is true that there is superficial overlap in the offerings of these associations — conventions, websites, education, publications, lobbying — these similarities do little to establish that they are competing in the same product market with Realtors. [pp. 16a]

The lower court also carbon-copied the *Reifert* court's dismissal of candidate rivals based on their selling to a subset of NAR's market. It quoted the reasoning of *Reifert*:

> As to NAAEBA and MABA, it held that they both exclusively served buyer agents and that the latter served only agents in Massachusetts. . . .
>
> As to the AI, NAIFA, and NAREA, the court held that they were dissimilar because they were devoted to providing services solely to real estate appraisers . . .
>
> Finally, the AREAA and NAHREP were held not to be substitutes for Realtors associations as a matter of law because they served only distinct ethnic communities, that is, Asian and Hispanic realtors. [p. 17a]

REASONS FOR GRANTING THE PETITION

This case is virtually identical to the case of *Reifert v. South Central Wisconsin MLS Corp.*, no. 06-815, docketed before this Court on Dec. 13, 2006, on a petition for a writ of certiorari. The issues are the same: whether a Realtor association can tie the sale of MLS subscriptions to the purchase of trade association services from the National Assn. of Realtors, and force MLS users not to compete with each other in ways that are legal under state law. The lead counsel on both sides are the same. The economic experts are the same. The evidence presentation was the same. The dozen trade associations offered as candidates in the same market as NAR was the same. The Sixth Circuit adopted the published decision in the district court, which in turn adopted the reasoning of the district court in *Reifert*.

1. The lower court's rejection of candidate firms from the market based on racial or ethnic interests, sales standards, sales volumes, and product distinctions, violates the law of this Court and conflicts with many circuits

A tie-in violation requires proof of adverse impact in the tied product market. Such proof requires there be least one firm other than the tied product seller in that market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). In an early MLS-Realtor tie-in case, plaintiff's failure to offer even one candidate as a rival to the local Realtor association in the tied product market was fatal to the claim. *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir. 1988). In *Thompson*, another MLS-Realtor tie-in case, the plaintiffs showed there were two competitors in the tied product market, satisfying the adverse

impact element of the claim. The *Thompson* plaintiffs showed the tie-in affected a not-insubstantial volume of interstate commerce through cross-elasticity evidence: the diversion of 400 local memberships with a gross yearly revenue value of $30,000 - $70,000. Here, petitioners used the same methods at the national level: over 8,000 national memberships in six rival trade associations were diverted yearly by the tie-in, causing yearly losses of over $1 million to rival trade associations.

Edwards defines sellers in the tied product market as regional or national firms selling trade association services to residential agents and appraisers.[2, 3] She defines the buyers in that market as all residential realty agents and appraisers in the United States. It is undisputed NAR is a seller in that market selling to one million buyers, consisting of realty agents and appraisers.

Edwards offered twelve candidates as competitors to NAR in that tied product market. The district court and the lower court rejected every candidate on grounds that violate the established law of this Court and many circuits.

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2. This relationship is sometimes referred to as selling "memberships." Because memberships can be created without financial transactions in other contexts (i.e., being a member of a family, political party, or religious group), we believe use of the term "membership" is ambiguous and misleading, and should be avoided in the analysis of cases involving sale of trade association services.

3. Because MLS users must buy three trade association services from separate Realtor associations at three levels, there are actually three tied products. In this case, Edwards utilizes only one tied product seller and its market: NAR.

Racial/ethnic differences

The lower court rejected five candidate firms because they "served only distinct ethnic communities." 17a. In fact, none of the five "minority" trade associations required members to be of non-Caucasian ancestry. They sell services to persons of *all* races and ethnicities. The National Association of Real Estate Brokers, known as NAREB, testified at deposition through its president, Ronald Branch, who is also a member of NAR. Nothing in the record indicates the racial or ethnic composition of NAREB. Mr. Branch was asked to estimate the racial/ethnic composition of NAREB but he was unable to do so. He stated NAREB was open to people of all ethnicities. What disqualified NAREB in the eyes of the lower court was not its racial composition — since it was unknown — but its support for minority members in real estate.

The 2005 population of the United States was 296,410,000.[4] Of those, 4,579,000 people (1.5%) were of two or more races, counting the non-white races as black/African-American, American Indian, Alaska Native, Native Hawaiian, and Pacific Islander. Of single-race people, 237,855,000 were white. The census considers Hispanics to be racially white, and in 2005 the United States had 42,687,000 Hispanics. Thus, in 2005, there were 195,168,000 white, single-race, non-Hispanics, accounting for 66% of the U.S. population. *Id.* The other third of America is minority, as the lower court used the term.

NAR sells trade association services to over one million real estate agents and appraisers. Since the U.S. population

4. Census.gov/prod/2006pubs/07statab/pop.pdf. Table 13.

is one-third minority, it is likely that about one-third of NAR's customers are minority, numbering its minority customers at about 330,000. In contrast, the minority associations Edwards proposed as competitors to NAR had a total customer base of about 13,000. Thus, NAR's minority business is over ten times the minority business of the minority associations. Yet, the lower court held as a matter of law NAR did not compete with the minority associations.

Differing customer requirements

The lower court rejected three trade associations as potential competitors of NAR because they "exclusively served buyer agents." p. 17a. NAR also has exclusive buyer agents as customers. Andrew Show, the president of the National Association of Exclusive Buyer Agents ("NAEBA") estimated 90% of NAEBA members were NAR members. He also testified NAEBA recruited new members from NAR conventions. Thus, in making its ruling, the Sixth Circuit had in mind the undisputed fact that both NAR and NAEBA sold to the same pool of buyers: real estate agents representing only buyers.

In *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991) the question was the same as here: whether an MLS tie-in caused adverse impacts in the tied product market of trade associations selling to real estate agents. The favored trade association was a Realtor association with no buyer-seller orientation. The disadvantaged trade association was predominantly African-American; its customers mainly represented buyers. The Eleventh Circuit found they competed in the same market as a matter of law. Edwards made the same showing as in *Thompson*. The handling of the question by the lower court directly conflicts with the Eleventh Circuit's.

Defendants claim because NAR sells its product to a non-identical group of customers than the dozen firms offered by Edwards, NAR's market is therefore different than the markets of those dozen other firms. However, the crucial observation is that NAR sells the same trade association services for the same price to African-American agents, Asian agents, Hispanic agents, exclusive buyer agents, and appraisers, just as the twelve candidate associations do.

Other circuits view overlapping customers as evidence of being in the same market. Third Circuit: *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) (rejecting plaintiff's attempt to define market as pizza suppliers approved by Domino's for its franchisees since wider market of all pizza operators were customers of wider group of suppliers; Eleventh Circuit: *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991) ("While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers.").

Overlapping customers does not force a conclusion that the products are in the same market. In *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966) the customers were the same: firms seeking some form of security services for their premises. The decisive factor that made central station services a separate market was that none of the candidate substitutes (such as watchman services) "appears to operate on the same level as the central station service so as to meet the interchangeability test of the *duPont* case." As the Tenth Circuit held in *Telcor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002), "Many courts have addressed the situation where two or more

products or services have similar functions but different physical characteristics. These cases make clear that the relevant inquiry remains whether the differences in type render the products poor substitutes. . . ."

Thus, the lower court departed from the fundamental legal principles of this Court and other circuits by: (1) focusing on the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap; (2) rejecting the dozen trade associations as candidates after finding insufficient buyer overlap, when it should have evaluated *all* the *Brown Shoe* factors; (3) not evaluating the evidence that the thirteen trade association service products were good substitutes, and (4) not evaluating Edwards's evidence of cross-price elasticity between NAR products and those of other associations.

2. The Sixth Circuit's resolution of the disputed market definition issue conflicted with the law of most circuits that such questions are factual, presenting a triable issue, presenting a matter not decided by this Court

The circuits have held that market definition is a question of fact for the jury. *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996); *Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984); *Thompson*, 934 F.2d at 1573-74 (11th Cir. 1991).

In contrast, the lower court opinion appears to treat the question as one for the court to resolve. Edwards submits that at a minimum, she met her burden of proving sufficient evidence to support a finding that there is a national market in which the buyers are residential realty agents and

appraisers, the sellers are national and regional trade associations, and the product being sold is the package of services consisting of conventions, websites, education, publications, and lobbying. Three circuits describe the burden of proving competitors in the tied product market as "minimal" or "modest." *Wells* ("the plaintiff must make some minimal showing of real or potential foreclosed commerce caused by the tie, if only as a matter of practical inferential common sense," 850 F.2d 803, 815 n.11); *Osborne v. Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir. 1960) ("modest showing"); *Thompson*, 934 F.2d at 1570-1571. It was not incumbent on Edwards to demonstrate the outer bounds of the tied product market.

We have found no ruling by this Court on the question of whether market definition is for the court or the jury. Thus, it appears to be one of first impression. The Court should grant certiorari to answer this important question, and decide whether Edwards met her minimum burden, and if so, whether she established at least two competitors in that market.

3. In ruling NAR's no-contact rule was reasonable, the lower court departed from this Court's ruling in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)

Under *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), it is a Sherman Act violation for competitors to enact "ethical" rules that prohibit competition. NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have listed their properties with other Realtors. The rule prohibits agents from seeking to represent sellers when buying another

property. It takes away from rookie agents one of the most potent tools they would otherwise have to compete with established agents. The rule stifles competition.

Edwards's desire to send targeted mail to real estate sellers with listings with other realty agents is legal under Kentucky law. Defendants' MLS tie-in strips MLS users of their right to compete, because when they are forced to buy a Realtor membership, one of the membership "benefits" is enforcement of NAR's code of ethics, which prohibits competition under the non-solicitation rule.

Professional Engineers sustained a facial attack; this Court did not require the plaintiff to set forth evidence of harm to competition, since the rule itself was a "frontal assault" on the policy of competition under the Sherman Act. The penalties for violating the non-solicitation rule are fines up to $5,000 and MLS suspension up to three years.

4. Other issues support certiorari

A. The Circuits are requesting guidance The Seventh Circuit opinion in *Reifert* stated, "Economics, like other social sciences, has its share of counterintuitive findings, so observing things that to the untutored eye seem to be substitutes need not mean that they *are* good substitutes." 450 F.3d at 318. [internal quotations omitted]. The First and Tenth Circuits have observed, "There is no subject in antitrust more confusing than market definition." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993); *Telecor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002).

It would be appropriate for this Court to provide additional guidance to the circuits on market definition principles. This case offers a useful vehicle.

B. Edwards represents hundreds of thousands of others forced to purchase unwanted NAR services Edwards's record evidence was that MLS-Realtor tie-ins cover 84% of the 100 top US markets. In the remaining 16% of the markets, realty agents and appraisers have a choice whether to buy trade association services from NAR. Depositions in Massachusetts and Alaska, where statewide MLSs do not force purchase of NAR trade association services, establish that 30% of those MLS users do not purchase the NAR package. When projected over the one million NAR members, that figure indicates that over 250,000 realty agents and appraisers are coerced into buying the NAR package.

C. NAR dominates the trade association market but did not earn its prominence Edwards's record evidence shows NAR holds a 97% market share of the realty agent trade association market and 65% of the appraiser trade association market.[5] NAR didn't get there the honest way — through skill, foresight, and industry — but through forcing sales through MLS tie-ins.

D. Rival trade associations lose sales due to tie-ins Edwards obtained sales data for five of the twelve trade associations. Her record evidence groups sales rates for these

5. As indicated above, it is possible the market for trade association services for realty agents and the trade association market for appraisers are a single market. Further work would be required to determine whether they are separate markets or the same. However, nothing in this case rides on whether it's one market or two.

associations in the closed vs. open MLSs[6] in the top 100 markets. Comparing sales rates creates a cross-price elasticity study. In the closed MLSs, 30% of realty agents/appraisers perceive the price of the NAR package to be free, since it's an undesired add-on to the combined price paid for the tying product: MLS. In moving to open MLSs, realty agents/ appraisers perceive the NAR package at its true price, since it's offered separately. Thus, in the open MLS markets realty agents and appraisers perceive the NAR package are relatively more expensive than perceived in closed MLS markets. If there were cross-price elasticity, one would expect that sales rates of some of the five associations to rise in open MLS regions as compared to closed MLS regions.

Edwards's record evidence demonstrated cross-price elasticity between NAR products and the products of other trade associations. The evidence shows that over $1 million in yearly trade association sales are being diverted to NAR from the tie-in. Yet, the lower court excluded consideration of this evidence because of its erroneous understanding of how to apply the *Brown Shoe* factors.

E. Competition is suppressed in the $60 billion residential real estate brokerage market The Government Accountability Office report to the House of Representatives, *Real Estate Brokerage - Factors That May Affect Competition*, of August, 2005, concluded there was a lack of price competition between real estate brokers.[7] "One potential cause of the industry's apparent lack of price variation is the use of multiple listing services (MLS), which facilitates cooperation among brokers

6. A closed MLS is one that requires purchase of the NAR trade association package; an open MLS does not.

7. GAO.gov/new.items/d05947.pdf, last visited Dec. 7, 2006.

in a way that can benefit consumers but may also discourage participating brokers from deviating from conventional commission rates." p. 2 of 32. As described in the report, there is a new breed of realty agents in the market place that offers rebates to buyers who purchase a home through them. It works thus: the buyer purchases a home through such a buyer agent. The buyer agent typically receives half the commission paid by the seller to the seller's agent. The buyer agent then rebates part of the commission received to the buyer. Rebates can be many thousands of dollars. Such buyer agents present effective price competition in the marketplace.

At any given time, only about 5% of potential home buyers are looking to buy a home. The other 95% already have homes and don't plan to move. Thus, it would be desirable from a buyer agent perspective to spend marketing time and money on the 5% who are in the market. That 5% in the market to buy a home is nearly congruent with the pool of people selling a home — nearly all of whom list the home in the MLS. Thus, a buyer agent would ordinarily want to send buyer-oriented literature to sellers in the MLS as the most efficient use of marketing resources. This is prohibited by NAR rules, effectively enforced on Edwards since she's forced to adhere to NAR's rules as part of the MLS tie-in.

The lower court did not discuss the non-solicitation rule imposed on Edwards. The rule prohibits Edwards from contacting sellers to offer buyer-oriented services. The heart of the prohibition is the handshake rule: the first to shake the prospect's hand owns the prospect. Every state has a body of law prohibiting people from inducing others to breach their contracts, or interfering with an advantageous business relationship. Thus, agents using the MLS are already fully protected from the potential that Edwards will steal their customers.

NAR has created its own body of rules prohibiting competition across the United States that goes much farther than any state law. The rules are enforced in secret prosecutorial sessions leading up to expulsion from the MLS if a violation is found.

The substantial question for this Court is whether the handshake rule should be federal antitrust law. The GAO report concluded that price competition across the U.S. is absent. This case forcefully explains why such competition is absent in half of all real estate transactions — the half relating to buyer services.

Related questions: Should review of NAR's rule be facial, as in *Professional Engineers*?

The record evidence also explains how NAR's no-contact rule interferes with the *other* half of all real estate transactions, relating to the sell-side. Under the no-contact rule, if a listing is about to expire, all real estate agents are prohibited from sending letters to the seller advising that, since the house didn't sell in the initial listing period, they might want to list with a low commission agent so as to be able to effectively lower the price of the home without losing any of the net sale proceeds. Such price competition would be fully consistent with the Sherman Act's goals.

The prohibited contact would interfere with no listing contract since it would propose to take effect *after the first listing expires by its terms.*

This case presents the Court with: An authoritative government report concluding there is an absence of price competition in the real estate brokerage industry, with total

commissions of $61 billion paid in 2004 (GAO report, pg. 1); (2) NAR rules enforced nation-wide inhibiting competition on both the buy-side and sell-side of transactions; (3) that are enforced involuntarily through MLS tie-ins on over 250,000 realty agents, and voluntarily assumed by another 750,000; and (4) a petitioner who is restrained by respondents' and NAR's rules from competing in ways that are legal under state law.

F. NAR's MLS restraints challenged by the United States

A month before the filing of this petition the United States district court for the Northern District of Illinois filed its memorandum order denying NAR's motion to dismiss the government's case against it for national restraints relating to MLS practices. *United States v. National Assn. of Realtors*, 2006 U.S. Dist. LEXIS 86963 (N.D. Ill. Nov. 27, 2006). The government claims "NAR and its members have adopted policies and by-laws (that is, the two VOW policies), enforced by sanctions for non-compliance, that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers." *Id.* at *37 (internal quotations omitted).

In *US v. NAR* the MLS is central to creation and use of data that may be displayed through VOWs (virtual office websites). Edwards's case does not depend on the outcome of *US v. NAR*. However, the restraints alleged in *US v. NAR*, and NAR's insistence on enforcing those restraints, show the restraints alleged here are a substantial part of a national campaign by NAR to reduce competition in the brokerage market.

5. Standing, Competitive Injury

The lower court held that Edwards lacked antitrust standing. P. 15a. This ruling conflicts with *Thompson*, where a realty agent *did* have standing to challenge an MLS-Realtor association tie-in.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 4, 2006

No. 06-5100

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BUYER'S CORNER REALTY, INC.;
SHERRY EDWARDS,

Plaintiffs-Appellants,

v.

NORTHERN KY ASSOCIATION OF REALTORS, INC.;
NORTHERN KY MULTIPLE LISTING SERVICE,

Defendants-Appellees.

Before: NORRIS, COLE and COOK, Circuit Judges.

PER CURIAM. Appellants appeal the district court's order granting summary judgment for Appellees in a published opinion, *Buyer's Corner Realty, Inc. v. Northern Kentucky Association of Realtors*, 410 F.Supp.2d 574 (E.D.Ky.2006). After reviewing the record, the parties' briefs, the applicable law and with the benefit of oral argument, this court determines that no jurisprudential purpose would be served by a panel opinion and affirms the district court's decision for the reasons stated in that court's opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, COVINGTON DATED AND FILED JANUARY 20, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 04-37 (WOB)

BUYER'S CORNER REALTY, INC.

PLAINTIFF

VS.

NORTHERN KENTUCKY ASS'N OF REALTORS, ET AL

DEFENDANTS.

OPINION AND ORDER

BERTELSMAN, District Judge:

This is an antitrust action brought pursuant to Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The case is currently before the court on cross motions for summary judgment.

The court heard oral argument on these motions on Thursday, December 1, 2005. David Barry represented the plaintiffs, and Jack Bierig, Julie Potter, and Joseph Baker

represented the defendants. Also present was Cindy Dobias, Chief Executive Officer of the defendant companies. Official court reporter Joan Averdick recorded the proceedings.

Having heard the parties, the court now issues the following Opinion and Order.

FACTS

Defendant Northern Kentucky Association of Realtors ("NKAR") is a real estate professionals' trade association. It offers services to its members including training, technology services, computer classes, comparative data, legislative monitoring, and publications. As a condition of membership, NKAR requires members to join the Kentucky Association of Realtors ("KAR") and the National Association of Realtors ("NAR"). Those entities offer services in addition to the services provided by the NKAR.

In 2004, the annual membership fees for the NKAR, the KAR, and the NAR were $162, $98, and $84, respectively, for a total of $344. Upon payment of this amount to the NKAR, a realty agent becomes a member of all three associations. As of December 31, 2003, the NKAR had 1,055 members.

Defendant Northern Kentucky Multiple Listing Service ("NKMLS") is a wholly-owned subsidiary of the NKAR. It is a non-profit organization. The NKMLS operates a computerized database of homes for sale in Northern Kentucky that are listed with real estate agents who are members of the NKAR. The NKMLS is the only multiple

listing service in Northern Kentucky. The monthly fee for MLS services in 2004 was $35.00.

A real estate professional cannot purchase MLS services from NKMLS unless he or she has joined a NAR Federation trade association and is thereby authorized to use the Realtor® trademark.[1] However, real estate professionals do not have to join the NKAR in order to purchase MLS services from the NKMLS; they can join any NAR Realtor association. In 2003, the NKMLS gave access to its MLS to approximately 285 real estate brokers and agents who were members of associations of Realtors other than the NKAR.

Membership in an association of Realtors requires that a real estate licensee agree to subscribe to, and abide by, the Code of Ethics of the NAR. The Code contains a "non-solicitation" rule that, with respect to the MLS, allows listing brokers to place their listings on the MLS without the fear of losing those listings to other brokers who might otherwise solicit the seller. The Code also contains an arbitration clause that requires that members resolve their disputes through arbitration.

Also, NKAR members are free not to participate in the MLS. Of the 1,055 members who belonged to the NKAR at the end of 2003, 22 did not purchase MLS services from the NKMLS.

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1. The parties refer to this requirement as "the membership rule."

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The NKMLS also operates a publicly-available website which offers at no cost much of the listing information contained in the NKMLS database.

Fees for the NKAR are set by its Board of Directors, which consists of NKAR members who are elected by the association's general membership. Similarly, fees for the NKMLS are set by its Board of Directors, which consists of NKMLS participants and subscribers who are elected by NKMLS participants.

Plaintiff Buyer's Corner Realty, Inc. is a Kentucky corporation doing business in Northern Kentucky whose principal, plaintiff Sherry Edwards, is a licensed real estate broker. Edwards has been a member of a local association of Realtors for 24 years. She has been a member of the NKMLS for over 20 years. For the years 2001-2004, plaintiff paid $1,357 in trade association charges to the NKAR.

Edwards operates exclusively as a buyer's agent, that is, she never represents sellers or takes listings. She is also a member of the National Association of Exclusive Buyer Agents ("NAEBA"), an organization of real estate licensees who exclusively represent buyers. She believes that NAR and its affiliates are unethical because they permit real estate brokers to represent both the buyer and the seller in a single transaction. Edwards alleges that she has continued her membership in the NKAR solely to gain access to the NKMLS.

Edwards filed this action alleging that defendants' "membership rule" constitutes an unlawful tying arrangement and group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

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ANALYSIS

A. *Tying Claim*

Section 1 of the Sherman Act states, in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1.[2] Although the literal language of this statute prohibits every agreement in restraint of trade, the "Supreme Court has long recognized that Congress intended to outlaw only 'unreasonable' restraints." *In re: Cardizem CD Antitrust Litigation*, 332 F.3d 896, 906 (6th Cir.2003) (citation omitted).

"Tying" arrangements are one type of restraint that may run afoul of the antitrust laws. As the Supreme Court has explained, a "tying" arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 461, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (citation omitted). *See also Jefferson Parish Hosp. Dist. No.*

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2. Private persons are given a cause of action under the Sherman Act by Section 4 of the Clayton Act, which provides for a suit to recover treble damages by any person injured in his business or property by the violation of the antitrust laws. Section 16 of the Clayton Act allows injured parties to sue for injunctive relief.

2 v. Hyde, 466 U.S. 2, 12, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

A tying arrangement is a violation of antitrust law only if a "substantial volume of commerce is *foreclosed* thereby." *Jefferson Parish*, 466 U.S. at 16, 104 S.Ct. 1551 (emphasis added). This is because the primary concern about such arrangements is that they may allow a seller to exploit its power in the market for the tying product to invade, and then stifle competition in, the market for the tied product. *Id.* at 14-16, 104 S.Ct. 1551.

Thus, the Supreme Court noted in *Jefferson Parish* that where the buyer would not have purchased the tied product from another seller, such foreclosure is not present:

> Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Id. at 16, 104 S.Ct. 1551.

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The Sixth Circuit has formulated the elements of a tying claim as follows:

> A plaintiff may bring a private antitrust action based on an illegal tying arrangement under § 1 of the Sherman Act if he can allege that: (1) the seller has " 'appreciable economic power' in the tying product market"; and (2) "the arrangement affects a substantial volume of commerce in the tied market." . . . We have also required that a plaintiff allege: (1) the seller of the tying product has a direct economic interest in the sale of the tied product . . . ; and (2) the plaintiff has suffered an antitrust injury as a result of the tying arrangement. . . .

CTUnify, Inc. v. Nortel Networks, Inc., 115 Fed.Appx. 831, 834 (6th Cir.2004) (citations omitted).

1. ***Antitrust Injury and Standing***

The requirement that an antitrust plaintiff be able to prove that he or she has suffered "antitrust injury" is treated as a threshold issue of standing:

> [I]t is appropriate to turn first to the issue of antitrust standing before weighing the issues of relevant market, market share, etc. *In other words, before discussing the claims made in this case regarding relevant market and market power we must determine if [the plaintiff] has antitrust*

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standing to assert claims under the Supreme Court's precedents.

HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 876-77 (6th Cir.1991) (emphasis added).

In *HyPoint*, the Sixth Circuit emphasized the importance of the standing inquiry:

> Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing ensures that antitrust litigants use the laws to prevent anticompetitive action and makes certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

Id. at 877.

The standing requirement is so important that, even where a court concludes that an unlawful tying arrangement likely exists, it will still inquire whether the plaintiff before the court has itself suffered antitrust injury flowing from that

unlawful arrangement. *See In re: Cardizem CD Antitrust Litigation*, 332 F.3d 896, 909 n. 15 (6th Cir.2003) ("Our conclusion that the Agreement was a *per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury.").

Standing to bring an action under Section 1 of the Sherman Act is conferred by Section 4 of the Clayton Act, which provides, in pertinent part:

> Any person *who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . .*, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (emphasis added).

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the Supreme Court held that this statutory language requires more than mere injury proximately caused by a violation of the antitrust laws. Instead,

> Plaintiffs must prove *antitrust injury*, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. *The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.*

Id. at 489, 97 S.Ct. 690 (emphasis added).

Thus, the "antitrust injury element of standing ensures that a plaintiff can recover only for those losses that stem from the competition-reducing aspects of a defendant's behavior." *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Ass'n*, 388 F.3d 955, 965 (6th Cir.2004) (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990)) (Gibbons, J., concurring), *cert. denied*, __ U.S. __, 126 S.Ct. 334, 163 L.Ed.2d 47 (2005). *See also Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir.2005) ("Individual injury, without accompanying market-wide injury, does not fall within the protections of the Sherman Act.").

Antitrust plaintiffs do not suffer antitrust injury merely because they are in a worse position than they would have been had the challenged conduct not occurred. *See Brunswick*, 429 U.S. at 486-87, 97 S.Ct. 690. Consequently, "[d]amages do not constitute 'antitrust injury' unless 'attributable to an anti-competitive aspect of the practice under scrutiny.' " *HyPoint, 949 F.2d at 878* (citation omitted). *See also Campus Ctr. Discount Den, Inc. v. Miami Univ.*, No. 96-4002, 1997 WL 271742, at *1 (6th Cir. May 21, 1997) ("If a plaintiff fails to show anticompetitive conduct, that party lacks standing to bring the antitrust action."); *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir.1989) (noting that Supreme Court opinions on antitrust standing "have been read as teaching that the antitrust plaintiff must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions") (internal quotations and citation omitted).

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Viewing the facts and drawing inferences most favorable to plaintiffs, the court concludes that they lack antitrust standing as a matter of law. Although plaintiffs assert standing on the basis that they were forced to purchase an unwanted product-membership in a local Realtor® association-such "harm" does not constitute "antitrust injury" necessary for standing.

In *Jefferson Parish*, the Supreme Court was careful to point out that no antitrust claim would lie just because the plaintiff was "forced" to purchase an unwanted product if, absent the tie, he would not have bought it elsewhere. *Jefferson Parish*, 466 U.S. at 16, 104 S.Ct. 1551. This is because, in such a situation, no sales in the tied product market were foreclosed on account of the tie and, thus, there has been no harm to competition. *Id.* The plaintiff merely ends up with a product he did not want.

As Professor Areeda explains in his oft-quoted treatise,

> To be sure, the particular funds paying for the tied product might otherwise have been spent for some other purpose, ranging from banking it to buying another product or a night on the town. While depleting a bank account or foregoing some purchase in a different market might be said to "foreclose" sellers of banking services or sellers in other markets, that type of "foreclosure" does not differ in kind or degree from paying a higher price for the tying product, to which tying law is indifferent.

Phillip E. Areeda, *Antitrust Law*, § 1723a, at 297 (1991). *See also Young v. Lehigh Corp.*, No. 80C4376, 1989 WL

117960, at *15 (N.D.Ill. Sept.28, 1989) ("Although the plaintiff may have suffered an 'injury' in paying for club membership that he did not need or want, he did not suffer an 'antitrust injury' and, therefore, does not have standing to assert an antitrust tying claim.").

Thus, while plaintiffs may not have wanted to purchase a Realtor® membership, in order to bring this antitrust claim they must show that they have suffered an injury caused by some anticompetitive harm or effect flowing from that requirement. This they have not done.

Plaintiffs fail to explain how they have been harmed by any restrained competition in the tied product market. The only other association that plaintiff Sherry Edwards desires to join is the National Association of Exclusive Buyer Agents ("NAEBA"), and it is undisputed that she indeed is a member of that association.[3] Thus, the requirement that she belong to a local Realtor® association, and the cost thereof, has not prevented Edwards from joining another, non-NAR, association of her choice.[4]

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3. There are eight other associations that plaintiffs claim are "competitors" of local Realtor® associations. These are discussed below in regard to the market foreclosure issue. However, Edwards does not claim that but for the tie at issue here she would join any of these other groups.

4. In his treatise, Professor Areeda explains that there is no cognizable anticompetitive effect where the buyer proceeds in defiance of an attempted restraint and purchases a competing product:

> For example, dealers required to stock a manufacturer's full line would not be foreclosed to rival sellers at all if

(Cont'd)

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Plaintiffs' heavy reliance on *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566 (11th Cir.1991), is thus misplaced. There, one of the plaintiffs was the Empire Real Estate Board, an African American professional association founded in 1939 as an alternative to the NAR local affiliate in Atlanta, which did not then admit African American members. The court found that the Empire Board had standing to litigate the MLS tying claim because the evidence showed that Empire competed with the Realtors® association for members, and that Empire had lost members who dropped their memberships in favor of joining the Realtors® association in order to gain access to the MLS. *Id.* at 1571.[5]

(Cont'd)

> they would not stock a second brand in any event *or only minimally if they stock other brands anyway.*

Phillip E. Areeda, *Antitrust Law, § 1769el,* at 440 n. 48 (1996) (emphasis added).

For this reason, plaintiffs' citation to *Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276 (4th Cir.1987),* is inapposite. There, the plaintiff was foreclosed, by virtue of defendant's tying arrangement, from purchasing certain products from other suppliers that it otherwise would have purchased. *Id. at 1279 n. 1.* Here, Edwards wished to join, and did join, another association, notwithstanding the requirement that she join a Realtors® association. She thus has not been harmed by any such anticompetitive effect.

5. An individual real estate agent was also a plaintiff and also found to have standing. However, the First Circuit based its conclusion that he had standing on the fact that he had been denied access to the MLS and had suffered injury to his business as a result. *Id.* at 1572. Here, Edwards has never been denied access to the NKMLS and thus can show no comparable injury.

Here, no competing association has come forward to complain that it has lost members on account of the alleged unlawful tie, nor has any other real estate professional come forward alleging that he or she would have joined a competing association but for the NKMLS's requirement that they join a NAR affiliate in order to gain access to the NKMLS.[6]

Therefore, because plaintiffs have shown no antitrust injury as a matter of law, they lack standing to bring the tying claim.

2. *Zero Foreclosure*

Closely related to the concept of antitrust injury is the concept of "zero foreclosure": that is, where there are no other sellers of the tied product, no sales are foreclosed by the tie and thus competition is not harmed. *See* Phillip E. Areeda, *Antitrust Law*, § 1723a, at 296 (1991) ("When there are no rival sellers of the tied product to be foreclosed, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone.").

In an effort to demonstrate foreclosure, plaintiffs claim that certain other associations compete with Realtor® associations: the Massachusetts Association of Buyer Agents ("MABA"); the National Association of Exclusive Buyer

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6. Again, it is important to note that the NKMLS does *not* require that its participants join the NKAR in order to gain access to the MLS. Rather, membership in *any* local association of Realtors® will suffice. As previously noted, in 2003, NKMLS gave access to its MLS to 285 real estate brokers who belonged to Realtors® associations other than the NKAR.

Agents ("NAEBA"); the Asian Real Estate Agent Association ("AREAA"); the National Association of Real Estate Brokers ("NAREB"); the National Association of Real Estate Appraisers ("NAREA"); and the Appraisal Institute ("AI"). This argument fails for several reasons.

First, as another district court recently concluded in a nearly identical case, these entities are not in the same product market as the Realtor® associations. In *Reifert v. South Central Wisconsin MLS Corp.*, No. 04-C969-S, 2005 WL 2055958 (W.D.Wis. Aug. 25, 2005), the court considered cross-motions for summary judgment involving an identical challenge to a local MLS.

The plaintiff in *Reifert* also argued that these entities were "competitors" of the Realtors® defendants. The court found, however, that the undisputed facts showed that none of these entities served the same market as defendants:

> While it is true that there is superficial overlap in the offerings of these associations-conventions, websites, education, publications, lobbying-these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.
>
> Services are in the same market when they are good substitutes for one another. That is, when there is "interchangeability of use or the cross elasticity of demand between the product and the

> substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). Furthermore, plaintiff bears the burden to prove by econometric evidence that the products are good substitutes. . . . "[O]bserving things that to the untutored eye seem to be substitutes need not mean that they *are* substitutes." . . . Not only has plaintiff failed to bring forth econometric evidence, its proffered competitive associations do not appear to be good substitutes even to the "untutored eye."

Id. at *4 (some citations omitted) (italics in original).

The court then examined each of the named associations. As to the NAEBA and MABA, it held that they both exclusively served buyer agents and that the latter served only agents in Massachusetts. They were thus unlikely to be substitutes for Realtors® associations in Wisconsin. *Id.* Moreover, the plaintiff had joined NAEBA "without regard" to his membership in Realtors®. *Id.*

As to the AI, NAIFA, and NAREA, the court held that they were dissimilar because they were devoted to providing services solely to real estate appraisers, and they were thus unlikely substitutes for the far more general services provided by Realtors® associations. *Id.* at *5.

Finally, the AREAA and NAHREP were held not to be substitutes for Realtors® associations as a matter of law because they served only distinct ethnic communities, that is, Asian and Hispanic realtors. *Id.*

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The court concluded:

> Not only do none of these associations appear to be good substitutes, *plaintiff has not offered evidence of a single real estate professional who has joined one of these organizations instead of Realtors or who has declined to join because he or she is a member of Realtors.* The lack of such evidence is in stark contrast to the evidence in *Thompson* that 400 brokers fell into those categories.

Id. (emphasis added).

The court's reasoning in *Reifert* applies here. First, the Sixth Circuit, like the Seventh Circuit, places the burden on antitrust plaintiffs "to define the relevant market within which the alleged anticompetitive effects of the defendant's actions occur." *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Ass'n, 388 F.3d 955, 962 (6th Cir.2004)* (citation omitted), *cert. denied,* __ U.S. __, 126 S.Ct. 334, 163 L.Ed.2d 47 (2005). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Id.*

Likewise, the Sixth Circuit applies a "reasonable interchangeability" standard for determining whether alleged competitors are in fact part of the same product market. *Id.* at 961. Such interchangeability must typically be demonstrated by a "cross-elasticity" economic study. *Id. at 962.*

Plaintiffs' attempt to characterize these other associations as "competitors" to the NKAR is thus unavailing. Moreover, even if they were competitors, plaintiffs have produced no evidence that any real estate agent has declined to join them because of their Realtors® membership. And, as already noted, Edwards-just like the plaintiff in *Reifert*-joined the NAEBA anyway, notwithstanding her NKAR membership.

The First Circuit reached a similar result in the context of an antitrust challenge to an MLS system in *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.1988). There, the plaintiff Wells was a "traditional" realtor who preferred selling houses listed exclusively with him but whose share of local sales fell as more houses were listed through the local Realtors® Board's MLS. He accused the Board of an unlawful tie by virtue of the requirement that a real estate agent join the Board in order to use the MLS. The First Circuit affirmed a directed verdict on the tying claim, stating:

> Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in. The tying claim must fail absent any proof of anticompetitive effects in the market for the tied product.

Id. at 815 (footnotes omitted). *See also O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F.Supp. 111, 116 (E.D.N.Y.1988)

(granting summary judgment for defendants on MLS tying claim because plaintiff failed to show anticompetitive effect).

Therefore, plaintiffs have shown no foreclosure in the market for the tied product, and their tying claim should thus be dismissed. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) ("Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws.").[7]

B. *Group Boycott Claim*[8]

A plaintiff alleging an unlawful group boycott under the Sherman Act bears the burden of proving that the defendant's actions may suppress or even destroy competition. *Foundation for Interior Design Educ. Research v. Savannah College of Art & Design*, 244 F.3d 521, 530 (6th Cir.2001) (citation omitted).

As already discussed with respect to the tying claim, plaintiffs cannot show that the NKMLS's requirement that participants belong to a local Realtors® association has any anticompetitive effect in the "market" for real estate association services. This deficit is equally fatal to their boycott claim. *See Reifert*, 2005 WL 2055958, at *6 (rejecting

7. Given that the lack of antitrust injury is fatal to plaintiffs' claims, the court will not address defendants' alternative, independent arguments for summary judgment.

8. The standing analysis discussed above applies equally to plaintiffs' boycott claim, that is, they lack standing to bring such a claim because they have suffered no antitrust injury.

group boycott claim on nearly identical facts). *See also O'Riordan v. Long Island Bd. of Realtors*, 707 F.Supp. 111, 116 (E.D.N.Y.1988) (granting summary judgment for defendants on MLS boycott claim).[9]

Therefore, having heard the parties, and the court being otherwise sufficiently advised,

IT IS ORDERED that: (1) plaintiffs' motion for summary judgment (Doc. # 31) be, and is hereby, **DENIED**; (2) defendants' cross motion for summary judgment (Doc. # 33) be, and is hereby, **GRANTED**; and (3) defendants' motion to strike exhibits (Doc. # 42) and plaintiffs' motion to augment the record and permit briefing (Doc. # 56) be, and are hereby, **DENIED AS MOOT**.

A separate judgment shall enter concurrently herewith.

This 20th day of January, 2006.

Signed By:
William O. Bertelsman *WOB*
United States District Judge

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9. *See also Venture Res. Group, Inc. v. Greater New Jersey Reg. Multiple Listing Serv., Inc.*, No. 95-0401, 1995 WL 866841, at *2-3 (D.N.J. Aug.24, 1995) (rejecting Sherman Act challenge to MLS listing and discussing valid reasons for Realtors® board membership requirements).

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, COVINGTON DATED AND FILED DECEMBER 9, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 04-37 (WOB)

BUYER'S CORNER REALTY, INC.

PLAINTIFF

VS.

NORTHERN KENTUCKY ASS'N OF REALTORS, ET AL

DEFENDANTS

JUDGMENT

Pursuant to the Memorandum Opinion and Order entered concurrently herewith,

IT IS HEREBY ORDERED AND ADJUDGED that summary judgment is entered in defendants' favor and that this matter be, and it is, hereby **dismissed with prejudice**, and **stricken** from the docket of this court.

This 9th day of December, 2005.

s/ William O. Bertelsman
WILLIAM O. BERTELSMAN, JUDGE

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
FEB - 7 2007
OFFICE OF THE CLERK

(2)

No. 06-936

IN THE

Supreme Court of the United States

BUYER'S CORNER REALTY, INC., *et al.*,
Petitioners,

v.

NORTHERN KENTUCKY ASS'N OF REALTORS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a rule of respondent Northern Kentucky Multiple Listing Service, Inc. requiring membership in an association of Realtors® as a condition of participation in the MLS was not an unlawful tying arrangement where there was no evidence of any competitors in the alleged "tied" market for general real estate association services and where petitioners were free to join any of several competing associations of Realtors®.

2. Whether the Court of Appeals correctly found that petitioners' challenge to this rule also failed because petitioners produced no evidence that they had suffered any "antitrust injury."

3. Whether the Court of Appeals correctly declined to consider petitioners' antitrust challenge to Article 16 of the National Association of Realtors® Code of Ethics – which prevents MLS participants from soliciting sellers of properties listed on the MLS during the term of the exclusive listing – where that challenge was not pleaded in petitioners' complaint and was not raised until well after the close of discovery, and whether petitioners' challenge to Article 16 is meritless in any event, because petitioners offered no evidence of anticompetitive effects, the rule is necessary to induce brokers to place their listings on the MLS, and the rule does not prevent MLS participants from soliciting the seller for other properties or from soliciting the listing property after expiration of the exclusivity period.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent Northern Kentucky Multiple Listing Service, Inc. is a wholly-owned subsidiary of respondent Northern Kentucky Association of Realtors® ("NKAR"). NKAR has no parent corporation, and there is no publicly held company that owns 10% or more of NKAR.

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NAR, Code of Ethics and Standards of Practice (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code . 18, 19, 20

STATEMENT OF THE CASE

Respondent Northern Kentucky Association of Realtors® ("NKAR") is an association of real estate professionals in northern Kentucky. It is affiliated with the Kentucky Association of Realtors® ("KAR") and the National Association of Realtors® ("NAR"). In order to join NKAR, one must also join KAR and NAR. Membership in NKAR is generally open to any licensed real estate professional who agrees to abide by the NAR Code of Ethics and pays the applicable fees.

NKAR's membership benefits include the opportunity to participate in a multiple listing service ("MLS") operated by NKAR's wholly owned subsidiary, respondent Northern Kentucky Multiple Listing Service, Inc. ("NKMLS"). NKMLS also permits members of other associations of Realtors® to participate in the MLS. It does not, however, offer MLS participation to real estate licensees who choose not to join an association of Realtors®.

Petitioner Sherry Edwards is a residential real estate broker in Kentucky. She is the owner of petitioner Buyer's Corner Realty, Inc. Edwards has been a member of both NKAR and NKMLS for over 20 years. Neither NKAR nor NKMLS has ever tried to bar her from membership.

Petitioners filed this lawsuit because Edwards wishes to participate in NKMLS but does not want to be a member of NKAR or any other association of Realtors®. Petitioners alleged that the NKMLS rule limiting participation in the MLS to members of a Realtor® association ("Membership Rule") constitutes an unlawful tying arrangement in violation of Section 1 the Sherman Act, 15 U.S.C. § 1. Specifically, they alleged that the Membership Rule effectively tied Realtor® association membership (the "tied" product) to MLS participation (the "tying" product) and resulted in harm to competition in the tied product market – that is, the market

in which Realtor® associations compete. Petitioners also alleged that the Membership Rule constituted an unlawful group boycott.

The parties filed cross motions for summary judgment. The United States District Court for the Eastern District of Kentucky granted respondents' motion and denied petitioners' motion. The Sixth Circuit affirmed the district court's ruling in a *per curium* decision, stating:

> After reviewing the record, the parties' briefs, the applicable law and with the benefit of oral argument, this court determines that no jurisprudential purpose would be served by a panel opinion and affirms the district court's decision for the reasons stated in that court's opinion.

(Pet. App. 1a).

Regarding petitioners' tying claim, the courts below granted respondents summary judgment for two independent reasons. First, petitioners failed to allege that they had suffered any "antitrust injury" – as required to bring a private action under the Sherman Act – because merely being "forced" to purchase an unwanted product does not harm competition. (Pet. App. 12a-13a). Second, petitioners failed to make out a tying claim because they did introduce evidence of foreclosure in the relevant "tied" product market. As the district court explained, a necessary element of a tying claim is foreclosure of competition in the tied product market. (*Id.* at 7a, 15a). Such foreclosure cannot exist unless there is at least one other competitor in the tied product market. (*Id.*).

The district court then considered the associations proposed by petitioners as competitors to NKAR, NAR, and other Realtor® associations:

> Appraisal Institute
> Asian Real Estate Agent Association
> Chinese American Real Estate Professionals Association

Chinese Real Estate Association of America
Colorado Association of Exclusive Buyer Agents
Massachusetts Association of Buyer Agents
National Association of Exclusive Buyer Agents
National Association of Independent Fee Appraisers
National Association of Hispanic Real Estate Professionals
National Association of Independent Real Estate Brokers
National Association of Real Estate Appraisers
National Association of Real Estate Brokers

Finding that these associations have specific purposes that set them apart from the more generalized associations of Realtors®, the court concluded that petitioners had failed to adduce evidence from which a jury could find that any of these associations are in the same product market as NKAR or NAR. (Pet. App. 16a-18a).

The courts also found that, for the same reasons that petitioners' tying claim failed, petitioners failed to establish anticompetitive effects in any relevant market under his group boycott claim. (Pet. App. 20a-21a).

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT CORRECTLY APPLIED WELL-ESTABLISHED LAW IN FINDING THAT PETITIONERS FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

A. The Sixth Circuit Correctly Found That The Undisputed Evidence Demonstrated That The Associations Proffered By Petitioners Do Not Compete With Associations Of Realtors®.

Petitioners do not dispute the fundamental proposition of tying law which underlies the Sixth Circuit's decision – namely, that in order to demonstrate the requisite foreclosure

of competition in the tied product market, a plaintiff must identify at least one other competitor in that market. (*See* Pet. 6; Pet. App. 7a, 15a). This is because, where there is no competitor, there is no competition to be foreclosed. Instead, petitioners merely disagree with the court's finding that they failed to adduce any evidence of such a competitor. The Supreme Court should not review this essentially factual issue – particularly where the Sixth Circuit did nothing more than apply well-established law to the evidence presented.

This Court has long held that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).[1] Petitioners argue that they presented evidence of such reasonably interchangeable "substitutes", but that the Sixth Circuit rejected the evidence on "grounds that violate the established law of this Court and many circuits." (Pet. 7). The Sixth Circuit, however, did no such thing. Indeed, far from creating a circuit split, the Sixth Circuit came to precisely the same conclusion as did the Seventh Circuit in *Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3332 (U.S. Dec. 11, 2006) (No. 06-815) – a lawsuit involving a challenge to an identical membership rule and involving virtually identical "evidence" concerning the existence of allegedly competing real estate associations.[2]

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[1] Petitioners claim the circuits are "requesting guidance" on market definition principles, but they identify no such requests. (Pet. 14-15). Rather, petitioners only cite statements by courts that market definition may be counterintuitive or confusing. (*Id.*).

[2] While the parties differed in *Reifert*, they were represented by the same counsel that represent petitioners and respondents here. In another recent unsuccessful lawsuit attacking an identical MLS membership rule, the district court for the Eastern District of Washington likewise found on summary judgment that the plaintiffs failed to identify any competitors to

Just as the Seventh Circuit did in *Reifert*, the district court here examined the associations proffered by petitioners and found, based on well-established principles of market definition, that they are not in the same product market as associations of Realtors®. Specifically, the district court found that each of petitioners' proffered associations targets a specific subset of real estate professionals – for example, appraisers, exclusive buyers agents, or members of certain racial and ethic minority groups. (Pet. App. 16a-19a). Given their "dissimilar" purposes, these niche associations offer different kinds of services and are not reasonably interchangeable substitutes for general associations of Realtors®. *See Reifert*, 450 F.3d at 319-20.

Petitioners argue that the district court improperly focused on "the degree to which the buyer populations of the thirteen firms differed, when it should have focused on the amount of overlap." (Pet. 12). However, this argument misconstrues the district court's analysis. The district court did not find that the proffered associations do not compete with Realtor® associations merely because they have different types of members. Rather, the point is that the differing focus of these associations impacts the types of *services* they provide, thus rendering those specifically-tailored services different from, and inadequate substitutes for, the more general services that Realtor® associations provide.

Petitioners seem to advance the notion that the existence of overlapping customers alone – for example, some appraisers belong to both NAR and the National Association of Exclusive Buyer Agents – demonstrates that the associations are in the same product market. (Pet. 9-12). But this notion is meritless. In a given neighborhood, many people may shop at both the local grocery store and the local department store,

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Realtor® associations. *See Prencipe v. Spokane Bd. of Realtors*, No. CIV-04-0319-LRS, 2006 WL 1310402, at *2 & n.4 (E.D. Wash. May 16, 2006).

but no one would suggest that these stores therefore compete in the same product market.

Rather, as petitioners later acknowledge, "[o]verlapping customers does not force a conclusion that the products are in the same market .... '[T]he relevant inquiry remains whether the differences in type render the products poor substitutes.'" (Pet. 11-12) (quoting *Telcor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132 (10th Cir. 2002)). As to this inquiry, petitioners produced no evidence whatsoever that the proffered associations are good substitutes for NAR or NKAR. For example, perhaps most glaringly, they did not present any testimony – lay or expert – that consumers find NAR or NKAR's services to be interchangeable with, or good substitutes for, the more specialized services provided by the other associations.

Rather than introduce evidence of interchangeability, petitioners argued that some or all of the associations provide the same types of services, such as educational opportunities, publications, and conventions. However, petitioners ignore the crucial question: What *kind* of educational opportunities, publications, and conventions? Unless these and other services cover substantially similar subject matters, they do not indicate that the associations compete in the same product market as one another. For example, the American Medical Association and the American Bar Association each provide educational opportunities, publications, and conventions. Yet no one would argue that they are competitors of each other – or of Realtor® associations.

As the district courts observed both here and in *Reifert*:

> While it is true that there is superficial overlap in the offerings of these associations – conventions, websites, education, publications, lobbying – these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional

> organizations offer such services while undoubtedly serving different product markets.

(Pet. App. 16a (quoting *Reifert v. South Cent. Wis. MLS Corp.*, No. 04-C969-S, 2005 WL 2055958, at *4 (W.D. Wis. Aug. 25, 2005))). Petitioners offered no evidence at all concerning the subject matter of the various associations' services. However, the associations' names clearly indicate differing subject matter tailored to specific subsets of real estate professionals.

Petitioners also argue that the district court improperly rejected their "cross-price elasticity" analysis. (Pet. 12, 15-16). As described in their brief, petitioners tried to compare real estate association membership rates in so-called "open MLS" areas with rates in "closed MLS" areas (that is, areas where the MLS allows non-Realtors® to join, and areas where it does not). (*Id.* at 15-16). Petitioners claimed that this comparison demonstrated an increase in membership rates for the allegedly competing associations over Realtor® associations in "open MLS" areas. (*Id.*).

Neither the district court nor the Sixth Circuit discussed this comparison. The most likely reason is that the evidence was not timely disclosed and thus was inadmissible under Fed. R. Civ. P. 37(c)(1).[3] Further, even if the comparison had been timely disclosed, it would have been inadmissible because it is both unreliable and irrelevant – as held by both the Seventh Circuit and the Western District of Wisconsin when addressing an identical comparison introduced by the plaintiff in *Reifert*.

First, as the Seventh Circuit observed, the this comparison "does not account for other possible explanations for the observed differences." *Reifert*, 450 F.3d at 319. In other

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[3] Specifically, the comparison described in petitioners' brief was not disclosed to respondents until the middle of summary judgment briefing in the district court, months after the close of fact discovery.

words, in direct contravention of well-established statistical methods, the comparison does not control for other variables that might affect association membership from place to place. As the district court in *Reifert* explained:

> It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed markets which suggest that other factors, far more than open or closed status, impact membership rates.

Reifert v. South Cent. Wis. MLS Corp., No. 04-C969-S, 2005 WL 2055958, at *6 (W.D. Wis. Aug. 25, 2005), *aff'd*, 450 F.3d 312 (7th Cir. 2006). This failure to control for other variables, as well as petitioners' failure to test for whether the observed differences were statistically significant, render their comparison unreliable and inadmissible. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (affirming summary judgment for defendants where plaintiff failed to control for other, non-discriminatory factors that may have caused statistical differences); *Jefferson v. Morgan*, 962 F.2d 1185, 1189 (6th Cir. 1992) (statisticians "do not simply look at two statistics ... and make a subjective conclusion that the statistics are significantly different"; rather, they "must employ a standard mathematical analysis" which includes a test for "statistical significance").

Second, as the Seventh Circuit also found, the comparison is "unreliable ... because it fails to speak to the central question of whether a competitor exists in this particular 'closed' market." *Reifert*, 450 F.3d at 319. Indeed, as the district court noted, Reifert's own expert witness (who also served as petitioners' expert here) "expressly testified at his

deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion." *Reifert*, 2005 WL 2055958, at *6.

While petitioners attempt to paint their comparison as a cross-price elasticity analysis (Pet. 16), that comparison simply does not examine – as a cross-price elasticity analysis must – whether changes in price for Realtor® association membership affect demand for the other allegedly competing associations. Petitioners also do not cite a single judicial decision or any economic authority supporting their novel approach to market definition, which inappropriately appears to focus on the price of the alleged tying product (MLS participation) rather than the alleged tied product (Realtor® association membership). Thus, whatever probative value petitioners' comparison may have, it simply does not speak to whether these associations are in the same product market as associations of Realtors®.

Petitioners further argue that the district court incorrectly rejected certain associations as potential competitors merely because of their "support for minority members in real estate." (Pet. 8). But petitioners misunderstand the court's reasoning. The district court did not hold that that these associations are not in the same product market as associations of Realtors® merely because they "support" various minority groups. Rather, the point is that, because they focus on specific minority groups and tailor their services to the needs and interests of those groups, these associations' services are different from, and are not good substitutes for, the more general services offered by associations of Realtors®. Further, the fact that these associations also allow non-minorities to join (*see* Pet. 8) does not change the fact that their services remain tailored to

minority communities and thus differ from the more general services offered by associations of Realtors®.[4]

Petitioners' reliance on *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991), (Pet. 9) is misplaced. There, one of the plaintiffs was a real estate association whose members were "predominantly African-American" and "mainly represented buyers." (*Id.*). The court stated that the this association "competes in the market for professional affiliation with the Realtors." *Thompson*, 934 F.2d at 1571. However, the Eleventh Circuit did not even discuss the market definition issue or how it came to this conclusion. Indeed, there is no indication that the appropriate market definition was even disputed by the parties. Thus, the Eleventh Circuit's single sentence on this issue is hardly persuasive and does not create a Circuit split. *See Estate of Magnin v. Commissioner*, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels."); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) ("A point of law merely assumed in an opinion, not discussed, is not authoritative.").[5]

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[4] For example, while the the president of the National Association of Real Estate Brokers (NAREB) testified at his deposition that NAREB is open to all races (Pet. 8), he also testified that NAREB focuses on minority real estate agents and on creating home ownership opportunities for Americans of minority race or status. (Branch Dep. at 7).

[5] Indeed, the distinction between *Thompson* and this case is essentially one of fact. The Eleventh Circuit's ultimate finding – that competition had been foreclosed in the tied product market – was based on evidence that, as a result of the alleged tie and the prohibitive cost of joining two groups, 400 brokers either did not join or quit the plaintiff board. *Thompson*, 934 F.2d at 1578. By contrast, petitioners did not, and could not, offer such evidence here. Indeed, they did not point to a single individual – not even petitioners themselves – who declined to join another association because he or she was required to join NKAR, KAR, and NAR. Instead, petitioners tried to introduce evidence that certain professionals simply do not wish to join NKAR. (Pet. 15). But even putting aside the substantial statistical inadequacies of petitioners' evidence in this regard, it is well established

This Court has long recognized that, to be in the same product market, products must be reasonably interchangeable. *See Brown Shoe*, 370 U.S. at 325. The lower courts here did nothing more that apply this concept in holding that petitioners had not submitted any evidence from which a jury could find that any of the diverse, specialized associations proffered by petitioners compete in the same product market as the more general Realtor® associations. There is no reason for the Supreme Court to disturb this finding.

B. The Sixth Circuit Did Not Err By Deciding An Issue Of Market Definition On Summary Judgment.

Petitioners next argue that the Sixth Circuit erred because market definition is a question of fact that must always be left to the jury to decide and can never be decided on summary judgment. (Pet. 12). They also claim that the Supreme Court has never decided "whether market definition is for the court or jury" and should address this "important question" of "first impression." (*Id.* at 13). But market definition is no different for these purposes than any other issue. The courts need only apply – as the lower courts did here – the time-tested summary judgment standards articulated in Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and other Supreme Court precedents.

Under Rule 56, the relevant inquiry on summary judgment is whether "there is no genuine issue as to any material fact

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that merely being forced to purchase an unwanted product does not create foreclosure in the tied product market. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984) ("when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed"), *abrogated on other grounds, Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).

and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As this Court explained in *Anderson*, a factual issue is "'genuine'" only if a "reasonable jury" could find for the non-moving party. *Anderson*, 477 U.S. at 248. In the case of market definition, the question thus becomes: could a reasonable jury find that the nonmoving party's proposed market definition is correct? This inquiry does not change simply because market definition is considered a question of fact. Rather, summary judgment remains appropriate where a reasonable jury could not find, based on the evidence presented, that the nonmoving party's market definition is correct.

Following these standards, courts have found that market definition issues may be decided on summary judgment where appropriate. For example, in *Colsa Corp. v. Martin Marietta Services, Inc.*, 133 F.3d 853 (11th Cir. 1998), the Eleventh Circuit noted: "we disagree with Colsa's contention that merely because the definition of 'relevant' market' is a factual question, summary judgment is inappropriate. Summary judgment is clearly available even for factual issues." *Id.* at 855 n.4. *See also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1999) (affirming summary judgment for defendant because there was insufficient evidence concerning the relevant market); *Flegel v. Christian Hosp. Ne.-Nw.*, 4 F.3d 682, 689-91 (8th Cir. 1993) (affirming summary judgment because there was insufficient evidence to support plaintiffs' proposed market definition.); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 481 (3d Cir. 1992) (en banc) (affirming summary judgment because plaintiff's evidence did not support its proposed market definition).

Further, contrary to petitioners' contention, the decisions they cite do not hold that market definition issues must always reach the jury. In *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir. 1996), the First Circuit considered whether to reverse a jury's verdict,

stating: "we must bear in mind that 'market definition is a question of fact' and 'we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*'" *Id.* at 196 (emphasis added). The court also stated: "Although Costal has properly pointed out that the question of market definition is one of fact for the jury, a plaintiff *must present sufficient evidence from which a reasonable jury could find the existence of the proposed relevant market.*" *Id.* at 197 (emphasis added). The court then went on to find – as a matter of law – that the jury's market definition was incorrect and reversed the jury's monopolization verdict. *Id.* at 198-99.

Similarly, in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984), the court stated that "[m]arket definition is a question of fact, and we therefore must affirm the jury's conclusion *unless the record is devoid of evidence upon which the jury might reasonably base its conclusion.*" *Id.* at 825 (emphasis added) (citation omitted). And in *Thompson*, the Eleventh Circuit stated that "[t]he parameters of a given market are questions of fact, and therefore summary judgment is inappropriate *if there are material differences of fact.*" *Thompson*, 934 F.2d at 1573 (emphasis added) (citation omitted). Thus, each of these decisions recognizes that, while market definition is considered a question of fact, it can be decided on summary judgment where the plaintiff fails to submit evidence sufficient to support his proposed definition.

In addition to arguing that market definition can never be decided on summary judgment, petitioners also try to reduce their burden by asserting that they need only make a "'minimal'" or "'modest'" showing regarding the existence of competitors in the tied product market. (Pet. 13). But no court has accepted this proposition, and the cases cited by petitioners provide them no support. In *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803 (1st Cir. 1988), the First Circuit required plaintiff to show that there was some minimal amount of foreclosure in the tied product

market; it did not reduce the plaintiff's burden of proof in so showing. *Id.* at 815 n.11. Moreover, the "modest showing" mentioned in *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), applied to a showing of market power in the *tying* product market, not the existence of competitors in the *tied* product market. *Id.* at 841. And *Thompson* made no mention of a lower burden of proof for this element of a tying claim. *See Thompson*, 934 F.2d at 1570-79.

In sum, petitioners failed to produce evidence from which a reasonable jury could find that any of the proffered associations compete in the same product market as NKAR, NAR, or any other association of Realtors®. The Sixth Circuit's finding was not error, and there is no reason for the Supreme Court to grant certiorari.

II. THE LOWER COURTS CORRECTLY FOUND THAT PETITIONERS FAILED TO ADDUCE EVIDENCE OF "ANTITRUST INJURY."

Petitioners spend at total of two sentences on their position that the Sixth Circuit's holding regarding lack of antitrust injury conflicts with the Eleventh Circuit's decision in *Thompson*. These two sentences are unconvincing, and an examination of the decisions reveals that there is no such conflict.

An "antitrust injury" is "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 477 (1977). In other words, the plaintiff's loss must stem from the *anticompetitive harms* caused by the defendants' conduct, not merely the conduct alone. *Id.* at 478.

The law of tying arrangements seeks to prevent anticompetitive harms in the market for the tied product. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 (1984), *abrogated on other grounds, Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). Thus, for a

plaintiff to have standing, its injury must result from the effects of restrained competition in the tied product market – *i.e.*, reduced output or raised prices in that market. *See, e.g., Pogue v. International Indus., Inc.*, 524 F.2d 342, 344 (6th Cir. 1975) ("In the typical tying arrangement, the victim's injury lies in the higher prices that must be paid for the tied product as a result of the seller's economic power in the tying product market."); *Crossland v. Canteen Corp.*, 711 F.2d 714, 722-23 (5th Cir. 1983) (to demonstrate antitrust injury, plaintiff must be able to show that the tied product price exceeded the market price); *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285-86 (11th Cir. 1982) (holding that "injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value" and affirming summary judgment for defendant because no such showing was made).

Petitioners identified no facts demonstrating that Realtor® associations raised prices or reduced output in the alleged tied product market. This failure is not surprising, because supracompetitive pricing of NKAR membership would be economically irrational. NKAR is a non-profit organization which exists for the benefit of its members. NKAR's membership dues are voted upon by the NKAR Board of Directors, which consists of NKAR members who are elected by NKAR's general membership. Because those who set the price of NKAR membership also pay that price, NKAR has no rational incentive to set prices above market levels. Rather, in calculating the level of dues to charge its members, NKAR takes into account only its past and future expected costs of providing services, in order to recover those costs. It does not seek to make *any* profits, much less monopoly profits.

Rather than focusing on price or output, petitioners argued below that they suffered antitrust injury because they were forced to purchase an unwanted Realtor® association membership. The court correctly held that "such 'harm' does not constitute 'antitrust injury' necessary for standing." (Pet.

App. 12a). As the court noted, "[i]n *Jefferson Parish*, the Supreme Court was careful to point out that no antitrust claim would lie just because the plaintiff was 'forced' to purchase an unwanted product if, absent the tie, he would not have bought it elsewhere." (*Id.* (citing *Jefferson Parish*, 466 U.S. at 16)). "This is because, in such a situation, no sales in the tied product market were foreclosed on account of the tie and, thus, there has been no harm to competition ... The plaintiff merely ends up with a product he did not want." (*Id.* (internal citation omitted)). *See also* 10 Phillip A. Areeda et al., *Antitrust Law* ¶ 1723a (2d ed. 2004); *Jefferson Parish*, 466 U.S. at 14 ("[T]he law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other.").[6]

While buyers may suffer injury-in-fact when they are forced to purchase an unwanted product, no competition is restrained in the tied product market. In these circumstances,

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[6] In the district court, petitioners relied on the following language from *Jefferson Parish*, 466 U.S. at 12:

> [T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

However, this statement does not stand for the proposition that the purchase of an unwanted product suffices for antitrust injury. Rather, while this "essential characteristic" may be *necessary* to a tying arrangement, it is certainly not *sufficient* for a finding of private antitrust liability. Otherwise, the cited statement would be impossible to reconcile with the Court's statement later in the same opinion that:

> when a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Id. at 16.

the harm asserted does not flow from any anticompetitive effects of the alleged tie and does not constitute antitrust injury. *See Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir. 2005) ("Individual injury, without accompanying market-wide injury, does not fall within the protections of the Sherman Act.").

Contrary to petitioners' claim, the decision below does not conflict with *Thompson* on this point. There, the plaintiff was denied access entirely to the defendants' MLS – he did *not* purchase an unwanted membership – and he suffered injury to his business as a result. *Thompson*, 934 F.2d at 1572. The court also found evidence that "the expense of dual membership in trade groups can be prohibitive for some brokers" and that membership in the Empire board had been foreclosed as a result. *Id.* at 1578. Here, by contrast, petitioners have not been denied access to NKMLS at any time, have admitted that NKAR dues are not material to their business, and have admitted that they would not have otherwise purchased membership in another association..

In sum, in finding that petitioners failed to adduce evidence that the Membership Rule caused them antitrust injury, the lower courts followed well-established precedent concerning antitrust injury and did not come in conflict with the Eleventh Circuit's holding in *Thompson*.

III. THE LOWER COURTS PROPERLY DID NOT ADDRESS ARTICLE 16 OF THE NAR CODE OF ETHICS, WHICH IS LAWFUL IN ANY EVENT.

Petitioners argue that, "[i]n ruling NAR's no-contact rule [Article 16] was reasonable, the lower court departed from this Court's ruling in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)." (Pet. 13). But in fact, the Sixth Circuit made no such ruling. Neither the Sixth Circuit nor the district court even addressed petitioners'

arguments regarding Article 16 – and for good reason – given that petitioners had failed to raise the issue properly.

Petitioners' First Amended Complaint did not even mention Article 16, much less allege that it violates the antitrust laws. Nor did it name as a defendant the National Association of Realtors®, which is responsible for Article 16. *See* Fed. R. Civ. P. 19. Notably, petitioners never sought leave to amend their complaint in order to add this theory of liability or to add NAR as a defendant. Rather, petitioners raised their Article 16 argument for the very first time in a document entitled "Supplemental Disclosure 1 of Evidence and Legal Theories Asserted by Plaintiffs." This document was never filed with the Court, but instead was served on respondents two days before summary judgment motions were due, and over six months after the close of fact discovery. It was thus entirely proper for the Sixth Circuit and the district court to disregard petitioners' arguments regarding Article 16. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984) (refusing to consider theory of antitrust liability that was not pleaded in the complaint); *Rosenfeld v. Lion Mfg. Corp*, 253 F.2d 90, 93 (7th Cir. 1958) ("[I]t is axiomatic that plaintiff cannot recover upon a cause of action different from that upon which his complaint is based.").

In any event, a finding that Article 16 does not violate the Sherman Act would not, in fact, conflict with *Professional Engineers*. To begin, petitioners failed to allege even that they suffered any injury as a result of Article 16, much less antitrust injury. Article 16, Standard of Practice 16-2, on which petitioners focus, prevents a Realtor® from contacting a seller who has a current exclusive listing agreement with another Realtor® and arranging to enter into a new listing agreement to begin when the exclusive agreement ends. NAR, *Code of Ethics and Standards of Practice*, art. 16, 16-2 (Jan. 1, 2007), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2007Code ("NAR Standard of Practice"). However, petitioners represent only buyers and never takes

listings from sellers. (Pet. 2). Thus, this application of Article 16 does not restrain petitioners at all.

Petitioners also argue that Article 16 prevents them from contacting a seller who has a current exclusive listing agreement with another Realtor® to sell one home and arranging to enter into an agreement to represent that seller in the purchase of another home. However, Article 16 does no such thing. NAR Standard of Practice 16-3 expressly states:

> Article 16 does not preclude REALTORS® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements.

Thus, petitioners are in fact entirely free to approach a seller who is under an exclusive listing agreement to sell one property in order to discuss representing the seller in buying a different property.[7]

More fundamentally, even putting aside the fact that Article 16 does not restrain petitioners in particular, Article 16 does not violate the antitrust laws at all. In *Professional Engineers*, the National Society of Professional Engineers prohibited its

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[7] NAR Standard of Practice 16-3 further states that "information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other Realtors® to whom such offers to provide services may be made." This does not mean that petitioners cannot contact those clients, but rather only that they cannot use the MLS as a database of potential clients. Such limitation on the use of MLS information is entirely reasonable, as the MLS does not exist to provide petitioners with leads for obtaining new clients. Instead, an MLS exists in order to help its participants bring buyers and sellers together. This restriction is also procompetitive, for the reasons discussed below. *See infra* pp. 21-22. Petitioners remain free to target clients of other Realtors®, so long as they do not use the MLS to identify those clients.

members from negotiating fees with, or providing any sort of pricing information to, clients prior to their selection for a project. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 683-85 (1978). This Court found the absolute "ban on competitive bidding" unlawful under the rule of reason (not under the *per se* rule, as petitioners suggest). *Id.* at 695.

Despite petitioners' hyperbole and repeated attempts to mischaracterize Article 16, the factual circumstances here are completely different from those in *Professional Engineers*. Article 16 does not place any restrictions on Realtors® in competing for listings, when a seller first decides to hire a broker. Article 16 also does not prevent Realtors® from soliciting listings and competing on all terms after an exclusive listing agreement has expired. (NAR Standard of Practice 16-8).

Even during the term of an exclusive listing agreement, Article 16 prevents brokers only from specifically targeting and making the initial contact with a seller who has an exclusive listing agreement in order to enter into another listing agreement on the same property. As long as the seller makes the initial contact, a broker is entirely free to discuss the terms of an agreement (including price) or to enter into an agreement which will commence when the exclusive listing is expired. (NAR Standard of Practice 16-6). And, as discussed above, brokers may solicit sellers in order to offer other services, such as buyer representation. (*Id.* 16-3). Brokers may also freely engage in general advertising, mailings, telephone canvassing, or other announcements. (*Id.* 16-2).

Given the actual scope of Article 16, the following statements in petitioners' brief are simply incorrect:

- Petitioner Edwards "is forced to agree to NAR rules that prohibit her from contacting property owners who have current listings with other realty agents." (Pet. 2-3).
- "NAR's non-solicitation rule prohibits Realtor association members from contacting sellers who have

> listed their properties with other Realtors. The rule prohibits agents from seeking to represent sellers when buying another property." (*Id.* at 13-14).

- "The rule prohibits Edwards from contacting sellers to offer buyer-oriented services." (*Id.* at 17).

Rather, it is only for the duration of the exclusive listing agreement that targeted solicitation of another's listing is banned – and for a procompetitive reason.

Article 16 promotes the effective functioning of NKMLS because, without such an assurance, Realtors® would be reluctant to submit listings to the MLS, thereby revealing the names and addresses of their clients to competing MLS participants. Thus, when faced with an identical challenge to Article 16 in *Reifert*, the Seventh Circuit upheld the rule as procompetitive and explained:

> If agents were reluctant to post their listings, for fear that other agents would steal their clients, the market would become less transparent and less efficient. Article 16 aids competition and fulfills the purposes of the Sherman Act by providing a more transparent marketplace.

Reifert, 450 F.3d at 321. Similarly, in granting summary judgment on an antitrust challenge to Article 16 in another lawsuit, the Eastern District of Washington noted that "Courts have consistently regarded the non-solicitation rule as being pro-competitive, providing an inducement for brokers and consumers to participate in the MLS." *Prencipe v. Sopkane Bd. of Realtors*, No. CIV-04-1319-LRS, 2006 WL 1310402, at *3 (E.D. Wash. May 16, 2006).

Indeed, as the Seventh Circuit further noted, the importance of a non-solicitation rule like Article 16 to a well-functioning MLS is demonstrated by the fact that state-wide MLSs in Massachusetts and Alaska (neither of which is affiliated with NAR) similarly require their users to agree not to solicit the

exclusive listings of other MLS users during the term of an exclusive listing agreement. *Reifert*, 450 F.3d at 321.

In light of these considerations, petitioners' suggestion that Article 16 is *per se* illegal must be rejected. "Courts apply per se treatment only after 'considerable experience' with a particular business practice has inevitably resulted in a finding of anticompetitive effects." *United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000). "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999). Moreover, the rule of reason applies where, as here, "horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Board of Regents*, 468 U.S. 85, 100-01 (1984). *See Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997) ("*[P]er se* illegality is limited to 'naked' restraints on trade and does not cover agreements that facilitate productive activity.... When the cooperative agreement contributes to productivity through integrated efforts, the Rule of Reason is the norm.")

As discussed above, Article 16 has productivity-increasing procompetitive benefits because it encourages participation in the MLS. Although petitioners dispute the value of such benefits, a challenge to Article 16 must be evaluated under the more searching rule of reason. *See California Dental Ass'n*, 526 U.S. at 778. ("The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA .... The point, rather, is that the plausibility of competing claims about the effects of [the defendant's conduct] rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown."); *Reifert*, 450 F.3d at 321

(applying the rule of reason to an identical challenge to Article 16).

Under the rule of reason, the initial burden is on petitioners to demonstrate that the challenged conduct has anticompetitive effects in a relevant product market. *See Bi-Rite Oil Co. v. Indiana Farm Bureau Co-op. Ass'n*, 908 F.2d 200, 203 (7th Cir. 1990). Here, petitioners were so convinced that Article 16 is *per se* illegal that they did not produce *any* evidence of anticompetitive effects – for example, evidence of increased commission rates or other harm to consumers due to Article 16. Instead, petitioners rely entirely on their assertion that Article 16 prevents them from contacting certain sellers in order to offer buyer representation services to them – a practice which is, in fact, expressly *permitted* under Article 16. *See supra* p. 19.

Because petitioners did not meet their burden of demonstrating anticompetitive effects under the rule of reason, the burden never even shifted to respondents to produce evidence of procompetitive effects. *See National Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003) (describing burden-shifting framework under the rule of reason). Thus, petitioners' arguments against Article 16's procompetitive effects are simply besides the point (not to mention incorrect), and summary judgment for petitioners was appropriate.

In a last ditch attempt to shore up their request for this Court to review Article 16, petitioners try to somehow connect their challenge with the Department of Justice's currently-pending antitrust lawsuit against the National Association of Realtors® (Pet. 19) and with a report from the Government Accountability Office which allegedly found a lack of price competition between real estate brokers (*id.* at 16-17). But as petitioners admit, the Department of Justice's lawsuit concerns NAR's rules governing brokers' display of listings on the internet. (*Id.* at 19). It has nothing to do with Article 16 or the Membership Rule challenged by petitioners

here. Further, petitioners cites nothing – nor could they – suggesting that the Government Accountability Office's report attributes any of the alleged lack of competition in the real estate industry to the practices at issue in this lawsuit.

With respect to Article 16, petitioners first erred by failing to challenge it in their amended complaint and by failing even to raise it until the eve of summary judgment motions, well after the close of discovery. Petitioners then erred again in a more substantive way by assuming that the *per se* rule would apply and thus neglecting to introduce any actual evidence of anticompetitive effects. But as the Seventh Circuit held in *Reifert*, the existence of procompetitive effects makes *per se* analysis inappropriate here. Rather, the rule of reason was the appropriate framework for analyzing Article 16. Petitioners failed to carry their burden under the rule of reason, and summary judgment for respondents was proper.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 7, 2007

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